STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2005
v	No. 253443 Wayne Circuit Court
TAWANDA SWAIZER, Defendant-Appellant.	LC No. 03-009818-01

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

Defendant Tawanda Swaizer appeals as of right her jury trial conviction for second-degree murder, MCL 750.317. Swaizer was sentenced to 15 to 25 years in prison. We affirm.

I. Basic Facts And Procedural History

Swaizer's conviction arises out of the August 14, 2003 stabbing death of her boyfriend, Thomas Miller, in a parking lot across the street from their residence. Miller and Swaizer, who was pregnant, lived together in the lower unit of a two-family flat. Several friends agreed that their relationship was characterized by arguments, threats, and aggression.

On the day of the stabbing, Miller had spent the day socializing with friends and family in his neighborhood. At some point during the evening, Miller and Swaizer began arguing about some of the guests who were at their house. Swaizer recalled that the argument "escalated," so she and Miller walked about thirty feet across the street into a parking lot. Swaizer claimed that Miller then started "to push me, shoving on me, punching me in my chest and like basically man-handling me, throwing me around."

Swaizer testified that she grabbed the knife out of her purse, and that the couple's struggle then took them near some cars in the parking lot. Swaizer claimed that Miller began choking her with both his hands so that "the back of my legs were on the car and I was bent over the car." Swaizer stated that Miller was choking her for what seemed to be five minutes. Fearing for her life and that of her unborn child, Swaizer then stabbed Miller in an attempt to get him off of her, although it was dark and she could not see where she was stabbing him. Swaizer recalled that Miller then walked away and fell to the ground. Swaizer dropped the knife and immediately went screaming for help.

Witnesses testified that Swaizer admitted having stabbed Miller, but did not mention that he had been choking her. Swaizer appeared apologetic, telling one witness "I didn't mean to do it," and she stayed with Miller until the authorities arrived. Detroit Police Officer Laurie Patton testified that Swaizer appeared "shaken, maybe a little scared" and that Swaizer told her, "That's my boy friend. I just stabbed him." Officer Patton arrested Swaizer after she again admitted that she had stabbed Miller. Swaizer explained to Officer Patton that she accidentally stabbed Swaizer during a fistfight, but she did not mention having been choked. According to Officer Patton, Swaizer told her where the knife was, was cooperative during the arrest, and appeared remorseful. Miller died from a single stab wound to the neck.

Swaizer gave a statement to police Sergeant Marion Stevenson that night. Swaizer told Sergeant Stevenson that she was having an argument with Miller, and it "escalated to a little pushing and shoving and I made a mistake and stabbed him." Swaizer explained that she only picked up the knife to scare Miller, but when he began pushing and shoving her, she stabbed him in the neck. When she saw how severely she had injured him, she screamed for someone to call EMS. She told Sergeant Stevenson that she "didn't mean to hurt him," that she "didn't do it intentionally," and that "it was a mistake." Sergeant Stevenson noted that there was no evidence that Miller had choked Swaizer.

Swaizer testified at trial that she did not intend to kill Miller and "never meant to hurt him at all," but simply wanted to scare him so he "wouldn't man-handle me again." Swaizer claimed that she did not tell the police that Miller was choking her because she was distraught and all she could think about was the fact that she "had made a mistake and stabbed him."

After nearly five hours of deliberations, the jurors sent a note to the trial court judge indicating that they were deadlocked and asking, "what do we do next?" The judge instructed the jurors to continue deliberations, which they did. The jurors then requested to have the testimony of one witness read back, which was done. The jury ultimately found Swaizer guilty of second-degree murder.

II. Jury Instructions

A. Standard Of Review

We review claims of instructional error de novo.[1]

B. Preservation Of The Issue

To preserve alleged instructional error, a defendant must object to the trial court's instructions before the jury deliberates[2] or request that a certain instruction be given.[3] The record does not reveal that Swaizer requested an accident instruction, objected to the absence of such an

[1] *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

[2] MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

[3] MCL 768.29; *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

instruction, or objected to the voluntary manslaughter instruction. Thus, Swaizer did not preserve her claims of instructional error for appeal.

Where an alleged instructional error has not been preserved, it is forfeited and review is for plain error affecting substantial rights.[4] Reversal is warranted "only when the plain, forfeited error results in the conviction of an actually innocent defendant or when an error 'seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."[5]

C. Voluntary Manslaughter Instruction

Swaizer first argues that the trial court committed error requiring reversal where it charged the jury with an imperfect jury instruction regarding voluntary manslaughter. We review jury instructions as a whole to determine whether there is error requiring reversal.[6] The instructions must include each element of the charged offense and must not omit material issues, defenses, and theories if supported by the evidence.[7] "Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights."[8]

The trial court instructed the jury regarding voluntary manslaughter as follows. The portions to which Swaizer objects on appeal are italicized.

> The crime of murder may be reduced to voluntary manslaughter if the defendant acted out of passion or anger brought about by adequate cause and before the defendant had a reasonable time to calm down.
>
> For manslaughter, the following two things must be present. First, when the defendant acted her thinking must be disturbed by emotional excitement to the point that a reasonable person might have acted out of impulse without thinking twice, from passion instead of judgment. This emotional excitement must have been a result of something that would cause a reasonable person to act rashly or on impulse. The law does not say what things are enough to do this. This is for you to decide.
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> Second, the killing itself must result *in* this emotional excitement. The defendant must have acted *for* a reasonable time *at best* to calm down and return to reason.

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[4] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[5] *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[6] *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

[7] *Id.*

[8] *Id.*

Swaizer takes issue only with the italicized portion of the last paragraph, arguing that the trial court instead should have said:

> Second, the killing itself must result *from* this emotional excitement. The defendant must have acted *before* a reasonable time *had passed* to calm down and return to reason.

These minor errors do not warrant reversal. First, when considering the instructions as a whole, the trial court correctly charged the jury with regard to voluntary manslaughter when it explained that "the crime of murder may be reduced to voluntary manslaughter if the defendant acted out of passion or anger brought about by adequate cause and before the defendant had a reasonable time to calm down." Although the third paragraph may have been imperfect, the issue was fairly presented to the jury by the first paragraph.[9]

D. Failure To Instruct Jury On Accident Defense

Swaizer alternatively argues that the trial court, *sua sponte*, should have instructed the jury regarding Swaizer's defense that the stabbing was an accident. Because defense counsel did not request the "accident" instruction or object to its omission, we must review to determine whether the trial committed a plain error affecting defendant's substantial rights.[10]

This Court has held that, under certain circumstances, the trial court's failure to give an accident instruction can warrant reversal.[11] The trial court must give the accident instruction if "'the defense theory is accidental homicide, the defense requests an instruction on the theory, and there is evidence to support the theory.'"[12] Further, the trial court must give the accident instruction sua sponte if "accident was a central issue in the case."[13] In this case, however, the defense theory was self-defense, not accidental homicide; the defense did not request the instruction; and there was no evidence to support the theory that the stabbing was an accident. Indeed, Swaizer admitted that she intentionally stabbed Miller, although she did not intend to kill him. Therefore, accident was not a central issue in the case, and the trial court was not required to read the accident instruction to the jury sua sponte.

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[9] *Id*.

[10] *Carines*, *supra* at 763.

[11] See, e.g., *People v Hawthorne*, 265 Mich App 47, 56; 692 NW2d 879 (2005).

[12] *Id*. at 52-53, quoting *People v Lester*, 406 Mich 252, 254-255; 277 NW2d 633 (1979).

[13] *Id*. at 54-56 (citing cases).

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Challenges to the effectiveness of trial counsel present mixed questions of fact and constitutional law.[14] We review the trial court's findings of fact for clear error and review de novo questions of constitutional law.[15] Because Swaizer failed to raise the ineffective assistance of counsel claim below in a motion for a new trial or an evidentiary hearing, our review is limited to the existing record.[16]

B. Legal Standards

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error or errors, the result of the proceedings would have been different.[17] To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome "the strong presumption that his counsel's action constituted sound trial strategy under the circumstances."[18]

C. Applying The Standards

Swaizer argues that she was denied the effective assistance of counsel because her trial attorney failed to object to the allegedly erroneous "voluntary manslaughter" jury instruction and failed to request the standard jury instruction regarding accident as a defense to murder. As discussed, the "voluntary manslaughter" jury instruction was proper. Because an attorney need not make a meritless motion or a futile objection, defense counsel's failure to object on this ground did not constitute ineffective assistance.[19] Further, although Swaizer could have presented inconsistent defenses,[20] Swaizer has failed to overcome the strong presumption that defense counsel's decision to present the self-defense defense alone was sound trial strategy.[21] This Court will not "substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight."[22] Accordingly, we conclude that Swaizer received effective assistance of counsel.

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[14] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[15] *Id*.

[16] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[17] *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

[18] *Id*. at 302.

[19] *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

[20] MCR 2.111(A)(2); *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997).

[21] *Toma*, *supra* at 302.

[22] *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

IV. Sufficiency Of The Evidence

A. Standard Of Review

We review de novo challenges to the sufficiency of the evidence, taking the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[23]

B. Reviewing The Evidence

Swaizer argues that the prosecution failed to proffer sufficient evidence to support her conviction for second-degree murder. The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.[24] Malice is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."[25] When the defendant sets in motion actions likely to cause death or great bodily harm, malice may be inferred.[26] An actual intent to harm or kill is not required; rather, the prosecution must establish the intent to commit an act that is in obvious disregard of life-endangering consequences.[27] Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient.[28]

With regard to the sufficiency of the evidence, questions of credibility and intent should be left to the trier of fact to resolve.[29] Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime.[30]

Here, the prosecution set forth evidence supporting each of the elements of second-degree murder. The prosecution showed that during an argument with Miller, Swaizer pulled a knife from her purse and plunged it into Miller's neck, causing his death. "Malice" was established by the facts that Swaizer pulled out a knife and held it close to Miller's neck while he was in close proximity and hovering over Swaizer during a struggle. Swaizer's behavior unquestionably qualifies as an "act that is in obvious disregard of life endangering consequences."[31] Although Swaizer argued that she had sufficient justification to draw the knife

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[23] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

[24] MCL 750.317; *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002).

[25] *Werner*, *supra* at 531, quoting *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

[26] *Id*., citing *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

[27] *Id*.

[28] *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

[29] *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

[30] *Carines*, *supra* at 757.

[31] *Werner*, *supra* at 531.

in self-defense, the jury rejected this theory. Viewing the evidence in a light most favorable to the prosecution, it was reasonable for the jury to find Swaizer guilty of second-degree murder.

V. Sentencing Challenges

A. Standard Of Review

We review the trial court's determination of the existence of a sentencing factor for clear error, and uphold those scoring decisions that are supported by any evidence in the record.[32] We review constitutional questions de novo.[33]

B. Lack Of Downward Departure

The trial court sentenced Swaizer to a minimum term of fifteen years (180 months) in prison for her second-degree murder conviction, which is within the guidelines' range of 180 to 300 months or life.[34] Swaizer argues that the trial court abused its discretion by failing to depart downward from the applicable sentencing guidelines range. However, because the trial court's sentence is within the appropriate guidelines' range, we are required to affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence.[35] Therefore, we may not consider Swaizer's argument on this point.

C. Scoring Of OV 5 And OV 6

We may, however, consider Swaizer's argument that the trial court erroneously scored two offense variables, which resulted in an inaccurate guidelines range. Specifically, Swaizer argues that OV 5, which the trial court scored at fifteen points, should have been zero; and that OV 6, which the trial court scored at twenty-five points, should have been ten points. Swaizer bases this argument on the trial court's failure to require that the underlying facts be proved to a jury beyond a reasonable doubt, which she argues is required under *Blakely v Washington*.[36] However, as her brief acknowledges, we are not free to accept this argument in light of the Michigan Supreme Court's position that *Blakely* does not apply to Michigan's sentencing guidelines.[37] Therefore, we will review the contested scores under the current framework, which requires us to uphold a scoring decision that is supported by any evidence in the record.[38] We note, however, that because the facts supporting the scoring of OV 6 were proved to the jury beyond a reasonable doubt, the result would be the same under either analysis.

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[32] *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003), citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

[33] *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

[34] MCL 777.16p; MCL 777.61.

[35] MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

[36] *Blakely v Washington*, 542 US ___ ; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[37] See *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

[38] *Witherspoon*, *supra* at 335.

The trial court scored OV 5 at fifteen points. The statute indicates that OV 5 should only be scored at fifteen points if "the serious psychological injury to the victim's family may require professional treatment."[39] If "no serious psychological injury requiring professional treatment occurred to a victim's family," the score should be zero.[40] The record is devoid of any evidence to support the trial court's scoring of fifteen points for OV 5. Although Miller's relatives appeared at the sentencing hearing, there was no evidence that any of Miller's family members sustained serious psychological injury requiring professional treatment. Therefore, we agree that OV 5 was erroneously scored.

However, a fifteen-point difference is not enough to place Swaizer into a different sentencing range unless OV 6 was also erroneously scored.[41] In scoring OV 6 at twenty-five points, the trial court was required to follow specific rules set forth in the guidelines.[42] Specifically, the pertinent portion of the statute requires the trial court to score OV 6 at twenty-five points under any of the following circumstances:

> The offender has unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result.[43]

The statute further provides:

> (2) All of the following apply to scoring offense variable 6.
>
> (a) The sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury.
>
> (b) Score 10 points if a killing is intentional within the definition of second-degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent.[44]

Swaizer argues that OV 6 should have been scored at ten points under the following guidelines:

> The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable

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[39] MCL 777.35(1).

[40] MCL 777.35(2).

[41] See MCL 777.61.

[42] MCL 769.34(2).

[43] MCL 777.36(1)(b).

[44] MCL 777.36(2).

amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life.[45]

Here, the jury found Swaizer guilty of second-degree murder rather than voluntary manslaughter, implicitly rejecting Swaizer's claim of self-defense. Indeed, "malice" for purposes of second-degree murder is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."[46] Under the guidelines, OV 6 should be scored at twenty-five points where "the offender . . . created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result,"[47] and this score should be "consistent with a jury verdict."[48]

The trial court's decision to score OV 6 at twenty-five points is consistent with the jury's verdict of second-degree murder. Swaizer's argument that the court should have scored OV 6 at ten points is inconsistent with the jury's verdict where the jury rejected Swaizer's self-defense claim and chose second-degree murder rather than voluntary manslaughter. Thus, the trial court correctly scored OV 6 at twenty-five points. Because the correct score would not change the guidelines' recommended range, remand for sentencing is not required.[49]

Affirmed.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad

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[45] MCL 777.36(1)(c).

[46] *Werner*, *supra* at 531.

[47] MCL 777.36(1)(b).

[48] MCL 777.36(2)(a).

[49] See *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003); *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003) (an erroneous scoring of the guidelines does not require resentencing if the trial court would have imposed the same sentence regardless of the error).